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Supreme Court of the United States

October Term, 1967

No. 340

STATE OF NORTH CAROLINA,

Respondent,

v.

ELMER DAVIS, JR.,

(Petition of Nivens and Bell, Attorneys)

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX

Opinion Below ---- 1
Jurisdiction ---- 1
Question Presented ---- 1
Statutes and Constitutional Provisions Involved ---- 2
History of the Case ---- 4
Statement of Facts ---- 5
Argument ---- 7
Conclusion ---- 11

TABLE OF CASES

Davis v. North Carolina, 365 U. S. 855, 5 L. ed. 2d 819, 81 S. Ct. 816 ---- 4
Davis v. North Carolina, 196 F. Supp. 488 ---- 4
Davis v. North Carolina, 310 F. 2d 904 ---- 4
Davis v. North Carolina, 221 F. 2d 494 ---- 4
Davis v. North Carolina, 339 F. 2d 770 ---- 4
Davis v. North Carolina, 382 U. S. 953, 15 L. ed. 2d 358, 86 S. Ct. 439 ---- 4
Davis v. North Carolina, 384 U. S. 737, 16 L. ed 2d 895, 86 S. Ct. 1761 ---- 4, 5
Gideon v. Wainwright, 372 U. S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792, 93 ALR 2d 733 ---- 9
Griffin v. Illinois, 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585 ---- 10
State v. Elmer Davis, Jr., 253 N. C. 86, 116 S. E. 2d 365 ---- 4, 5
State v. Davis (Petition of Nivens and Bell), 270 N. C. 1, 153 S. E. 2d 749 ---- 7

STATUTES

General Statutes of N. C. 15-4.1 ---- 2
General Statutes of N. C. 15-5 ---- 3, 6
18 USCA 3006A ---- 10
28 USCA 1257(3) ---- 1
78 Stat. 552 ---- 10

MISCELLANEOUS

Constitution of North Carolina, Article XIV, Section 3 ---- 10

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OPINION BELOW

The Opinion of the Supreme Court of North Carolina in this case now before this Court is reported in 270 N. C. 1 (Advance Sheets of Cases Argued and Determined in the Supreme Court of North Carolina, filed 12 April and 19 April, and issued 28 April, 1967). The Case is reported in the Southeastern Reporter System (153 S.E. 2d 749).

JURISDICTION

The Petitioners attempt to invoke the jurisdiction of this Court under Title 28 USC 1257(3). The Respondent, State of North Carolina, contends that there is no basis for the exercise of the jurisdiction of this Court as will be argued later on in this brief.

QUESTION PRESENTED

DOES THE REFUSAL OF THE STATE OF NORTH CAROLINA TO PAY PETITIONERS ATTORNEY FEES

FOR LEGAL SERVICES PERFORMED IN THE FEDERAL COURTS ON BEHALF OF AN INDIGENT DEFENDANT IN A CAPITAL CASE WHERE SUCH LEGAL SERVICES ARE NOT AUTHORIZED BY ANY COURT ORDER, EITHER STATE OR FEDERAL, AMOUNT TO A DENIAL OF THE PETITIONERS' CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

On pp. 3 and 4 of Petitioners' Petition for a Writ of Certiorari filed in this Court the Petitioners quote the pertinent parts of the Fourteenth Amendment, the Sixth Amendment and the North Carolina statutes in force when this case was tried in the trial court and decided by the Supreme Court of North Carolina.

Effective as of June 21, 1963, the General Assembly of North Carolina amended its statutes as to the appointment of counsel for indigent defendants, the pertinent sections being as follows:

> "Sec. 15-4.1. *Appointment of counsel for indigent defendants; plea of guilty by defendant without counsel; trial transcript and records for appeal by indigent defendant.*—When a defendant charged with a felony is not represented by counsel, before he is required to plead the judge of the superior court shall advise the defendant that he is entitled to counsel. If the judge finds that the defendant is indigent and unable to employ counsel, he shall appoint counsel for the defendant but the defendant may waive the right to counsel in all cases except a capital felony by a written waiver executed by the defendant, signed by the presiding judge and filed in the record in the case. The judge may in his discretion appoint counsel for an indigent defendant charged with a misdemeanor if in the opinion of the judge such appointment is warranted unless the de-

fendant executes a written waiver of counsel as above specified. A defendant with or without counsel may plead guilty but if the defendant is without counsel, the judge shall inform the accused of the nature of the charge and the possible consequences of his plea, and as a condition of accepting the plea of guilty the judge shall examine the defendant and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, but a defendant without counsel cannot plead guilty to an indictment charging a capital felony. Unless the judge determines that the plea of guilty was so made, it shall not be accepted. In case of an appeal to the Supreme Court the judge shall appoint counsel for such appeal or continue the services of counsel already appointed for the trial. The judge shall appoint counsel as soon as possible and practicable to the end that counsel so appointed may have adequate notice and sufficient time to prepare for a defense.

"When an appeal is taken under this section the county shall make available trial transcript and records required for an adequate and effective appellate review.

"Sec. 15-5. *Fees allowed counsel assigned to indigent defendant.*—Whenever an attorney is appointed by the court to defend an indigent defendant, he shall receive a fee for performing such service to be fixed by the court which shall be reasonable and commensurate with the time consumed, the nature of the case, the amount of fees usually charged for such cases in the county or locality. The fee so allowed shall be entered as a judgment against the defendant, signed by the court, and docketed in the judgment docket in the office of the clerk of the superior court and shall constitute a lien as provided by the general law of the State pertaining to judgments. Any funds collected by reason of said judgment shall be deposited in the State Treasury. All costs necessary for the administration of this section shall

be paid by the State of North Carolina except regular and ordinary court costs which shall be paid by the county as now provided by law."

HISTORY OF THE CASE

The Defendant, Elmer Davis, Jr., was convicted in the Superior Court of Mecklenburg County, North Carolina, of the murder of Foy Bell Cooper, which murder was committed while the Defendant was engaged in the rape of Foy Bell Cooper. The deceased was an elderly lady who had been in the habit of visiting her mother's grave in Elmwood Cemetery. Her body was found in a mausoleum located in the same cemetery. The Defendant having been convicted and sentenced to death appealed to the Supreme Court of North Carolina which affirmed the judgment of the trial court (STATE v. ELMER DAVIS, JR., 253 N. C. 86, 116 S. E. 2nd 365).

The Defendant filed a Petition for Certiorari in this Court, and the Petition was denied (ELMER DAVIS, JR., Petitioner, v. NORTH CAROLINA, 365 U. S. 855, 5 L. ed. 2d 819, 81 S. Ct. 816). The Petitioner filed a Petition for a Writ of Habeas Corpus in the Federal District Court, and this was denied (196 F. Supp. 488). The decision of the District Court was reversed by the Circuit Court of Appeals for the Fourth Circuit (310 F. 2d 904). A full hearing was held in the Federal District Court, and Habeas Corpus was again denied (221 F. 2d 494). On December 8, 1964, the decision of the Federal District Court was affirmed by the Court of Appeals (339 F. 2d 770). The Petitioner then filed a Petition for Certiorari in this Court and Certiorari was granted (ELMER DAVIS, JR., Petitioner, v. NORTH CAROLINA, 382 U.S. 953, 15 L. ed. 2d 358, 86 S. Ct. 439). This Court heard argument in the case on or about April 7, 1966, and reversed the lower court, holding that the confession of the Petitioner, Davis, was constitutionally inadmissible in evidence (ELMER DAVIS, JR., Petitioner, v. STATE OF NORTH CAROLINA, 384 U. S. 737, 16 L. ed. 2d 895, 86 S. Ct. 1761).

After the decision of this Court the State of North Carolina

concluded that it could not go any further in the prosecution of the Defendant, Elmer Davis, Jr., and the District Court ordered Davis released from the State Prison.

STATEMENT OF FACTS

In view of the fact that the Petitioners in this application for certiorari have not designated and certified the complete record the Respondent State of North Carolina has requested the Clerk of the Supreme Court of North Carolina, pursuant to Section 4 of Rule 21 of the Supreme Court Rules, to certify nine copies of the record which was printed for the use of the Supreme Court of North Carolina, as well as the Opinion of the Supreme Court of North Carolina and other papers in the record of the case. In this brief we will refer to the State record as "S. R.".

As we have stated before, in the History of the Case, the Defendant, Elmer Davis, Jr., was convicted in the Superior Court of Mecklenburg County, North Carolina, for the murder of Foy Bell Cooper, an elderly woman, while engaged in the perpetration of a rape. This conviction was affirmed by the Supreme Court of North Carolina and is reported as STATE v. ELMER DAVIS, JR., 253 N. C. 86, 116 S. E. 2d 365. The facts in the case appear in the Statement and Opinion of the Supreme Court of North Carolina. This Court denied Petition for Certiorari and the Petitioner, Elmer Davis, Jr., applied for Habeas Corpus in the District Court of the United States. There were various hearings and appeals and a resume of these proceedings in the Federal Court is set forth in the Petition which the Petitioners Nivens and Bell filed in the trial court and appears on pp 14, 15, of S. R. A resume with citations of the Opinions of the various Federal Courts is also set forth in this brief under the subject of "The History of the Case." This Court granted Petition for Certiorari, thus bringing up the case from the Circuit Court of Appeals for the Fourth Circuit, and this Court reversed the lower courts (ELMER DAVIS, Jr., Petitioner, v. STATE OF NORTH CAROLINA, 384 U. S. 737, 16 L. ed. 2d 895, 86 S. Ct. 1761.)

The State of North Carolina being of the opinion that it could not proceed any further in the case in view of the decision of this Court, the Defendant, Elmer Davis, Jr., was ordered by the District Court to be released from the State Prison insofar as this charge was concerned.

The only order authorizing the Petitioners, Nivens and Bell, to appear for the Defendant, Elmer Davis, Jr., will be found on S. R. p. 13, which appointed the Petitioners, Nivens and Bell, to represent the Defendant, Elmer Davis, Jr., "in the Superior Court of Mecklenburg County, North Carolina." Under the North Carolina law as it existed at that time for the appointment of counsel for an indigent defendant in a capital case the county was liable for the attorneys' fees under such an appointment (see p. 4 of the Petition for a Writ of Certiorari filed by the Petitioners in this case—North Carolina General Statutes, Section 15-5).

Mecklenburg County paid to the Petitioners, Nivens and Bell, the sum of $1700.00, which was determined by the Judges of the Superior Court of Mecklenburg County to be proper compensation for the legal services of Petitioners Nivens and Bell in the State Courts, and this is not denied by the Petitioners in this case. On S. R. p. 30 the Court will see that the trial judge found that Mecklenburg County had paid the Petitioners Nivens and Bell the sum of $1700.00.

The trial judge made findings of fact and entered judgment that the Petitioners Nivens and Bell be paid the sum of $8,000.00, to be divided between the two Petitioners, and that this was to be paid out of the Indigent Defense Fund established pursuant to Chapter 1080 of the Session Laws of 1963, of the State of North Carolina, which appropriation was made to pay counsel fees for attorneys for their services in the State courts and not the Federal courts as appears from the Opinion of the Supreme Court of North Carolina, which appears as a part of the Appendix to the Petition filed in this Court by the Petitioners, beginning on p. 6a.

The State of North Carolina filed a Petition in the Su-

preme Court of North Carolina to have the judgment of the trial court, as well as the record, brought up for review by that Court, and this Petition was granted and the matter reviewed by the Supreme Court of North Carolina upon briefs and argument, and this resulted in a decision of the Supreme Court of North Carolina to the effect that the judgment of the lower court be reversed and that the Petitioners Nivens and Bell were not entitled to compensation from the funds of North Carolina for thir services performed in the Federal Courts on behalf of Elmer Davis, Jr. (see 270 N. C. 1, 153 S. E. 2d 749, No. 7 Advance Sheet of South Eastern Reporter, 2nd series, May 4, 1967).

ARGUMENT

There are certain things that should be set forth in this case which are either admitted or not denied, as follows:

(1) The Petitioners Nivens and Bell were appointed by a court order to defend Elmer Davis, Jr. in a capital case in the Superior Court of Mecklenburg County. The order of the trial judge will be found on p. 13 of S. R., and the effective part of the order reads as follows:

> "Now, therefore, the court appoints Charles V. Bell and Walter Nivens of the Twenty-Sixth Judicial Bar to represent the above named defendant, Elmer Davis, in the Superior Court of Mecklenburg County, North Carolina."

This order was entered on November 10, 1959, and constitutes the sole and only order of appointment of counsel in all of the proceedings.

(2) It is stipulated by the Petitioners Nivens and Bell (see S. R. p. 44) that they never at any time had or received any order of appointment to represent Elmer Davis, Jr. in any of the proceedings in the Federal Court. The paragraph covering this stipulation is as follows:

> "That at no time did either Mr. Nivens or Mr. Bell receive an order from any federal judge or federal court

appointing them or either of them as counsel for Elmer Davis, Jr. in any proceeding in the federal court."

(3) That under the laws of North Carolina at the time this case was tried in the trial court and up through the period of time that the case was decided by the Supreme Court of North Carolina an indigent was entitled to counsel in a capital case to be appointed by the court, and counsel for such indigent defendant "shall receive such fee for performing this service as the judge may allow; * * * The fees so allowed by the judge shall be paid by the county in which the indictment was found."

(4) As found by the trial judge in Paragraph 12 of his Findings of Fact, Mecklenburg County paid the Petitioners Nivens and Bell $1700.00 for their services in the State court, and this was received and accepted by the Petitioners Nivens and Bell without any exception or objection (see S. R. p. 30).

(5) The State of North Carolina never at any time, either by judicial, administrative or executive authority, authorized the Petitioners Nivens and Bell to appear for the Defendant Elmer Davis, Jr. in any of the Federal courts, and so far as this record shows the Petitioners Nivens and Bell appeared for the defendant Elmer Davis, Jr. in the Federal courts because of their own wishes, of their own motion and as volunteers.

(6) The Petitioners Nivens and Bell do not allege or say, one way or the other, whether they received any compensation or fees from organizations, such as NAACP, CORE, ACLU or associations or organizations of like kind.

As will be seen from the quotation of statutes in this brief, North Carolina passed an act in 1963 (effective June 21, 1963) which provided for the appointment of counsel for any indigent defendant charged with a felony and also providing that the judge in his discretion could appoint counsel for an indigent defendant charged with a misdemeanor if in

the opinion of the judge such appointment of counsel was considered necessary. The statute also provided for a written waiver of counsel and for pleas of guilty after the accused had been informd by the judge of the nature of the charge and the possible consequences of the plea of guilty. The trial judge is required to examine the defendant to see that the plea is freely, understandably and voluntarily made without undue influence, compulsion or duress, and without promise of leniency. A defendant without counsel cannot plead guilty to a capital felony. This statute was never at any time applicable to the services performed by the Petitioners Nivens and Bell and has never been construed to be retroactive in its application. The North Carolina statute was passed in response to the decision of this Court in GIDEON v. WAINWRIGHT, 372 U. S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792, 93 ALR 2nd 733. As pointed out by the Supreme Court of North Carolina, the State statute provides for the appointment of counsel by Superior Court judges for indigent defendants and provides for the payment of fees to attorneys who are appointed by Superior Court judges of the State to represent such defendants only in the courts of the State. This is a construction of the Supreme Court of North Carolina, as will be shown by Mr. Chief Justice Parker, and this appears on pp. 15a, 16a, of the Appendix to the Petitioners' Petition for a Writ of Certorari filed in this Court. Furthermore, the State of North Carolina appropriated $1,000,000.00 for the biennium of 1963-1965, for the purpose of paying the fees, costs and expenses of the State Act (see p. 16a of Petitioners' Appendix). As shown by the Opinion of the Supreme Court of North Carolina, the State of North Carolina for the fiscal year ending June 30, 1964, paid, pursuant to orders of State court judges, the sum of $238,-956.00 to attorneys defending indigent defendants, there being a total of 3,003 such defendants, and for the fiscal year ending June 30, 1965, the State paid $390,427.00 to attorneys representing 3,941 indigent defendants. There was appropriated by the State to pay counsel for indigent defendants the sum of $442,332.00 for the fiscal year ending June 30, 1966, and $475,382.00 for the fiscal year ending June 30, 1967. For the fiscal year ending June 30, 1966, the State

paid out the sum of $491,600.00 to attorneys who represented 4,450 indigent defendants. The amounts paid exceeded the appropriation and $50,000.00 was made available by the State from the State's Contingency and Emergency Fund. For the fiscal year ending June 30, 1967, up through March 31, 1967, there was paid by the State to attorneys defending indigent defendants $379,950.00 for representation of 3,301 indigent defendants.

It is clearly the weight of authority, as shown by the Opinion of the Supreme Court of North Carolina, that in the absence of an enabling statute an attorney assigned by the court to defend an indigent defendant cannot recover compensation therefor from public funds. The Congress of the United States evidently thought that this was so because it enacted the Criminal Justice Act of 1964 (18USCA 3006A—Public Law 88—455; 78 Stat. 552). We understand that this Act has been construed not to be retroactive.

The Case of GRIFFIN v. ILLINOIS, 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585, is certainly not in point in any respect. The case simply held that it was a constitutional requirement for the State to furnish a free transcript so that an indigent defendant could obtain an appellate review. Actually the appellate review sought by Griffin was in a State court. It is not denied that likewise transcripts of the record should be furnished indigent defendants by the State for post-conviction proceedings. This is because the State is the custodian of these records and they should be available to the indigent as well as to those who can afford to pay for same.

Moneys paid into the State Treasury may be disbursed only in accordance with State legislative authority. It is provided by the North Carolina Constitution (Article XIV, Section 3) as follows:

> "No money shall be drawn from the Treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published."

If the position of the Petitioners Nivens and Bell is legally correct, then any attorney without appointment or authorization by the State of North Carolina may institute proceedings in the Federal court, and the State will be obliged to pay for same although the State did not sanction such appearance and would have no control over the attorney as to his conduct and efforts in protecting the rights of an indigent defendant and would have to pay the fee of the attorney, although there is no statutory authority to pay such fee and there is no authority for any State officer to determine the value of the services.

The State of North Carolina has no control and no authority over attorneys who represent indigent defendants in the Federal courts, yet under the theory of the Petitioners it would be liable for these obligations which are purely Federal in nature. There is no constitutional right for an attorney, who is an officer of the court, to receive fees for his services to an indigent defendant.

There is a general statement by Petitioners that their constitutional rights have been violated by withholding compensation in this case but it is not pointed out by them by any concrete statement the rights violated.

There is no possible way by which the Petitioners Nivens and Bell can assert their claim because the State of North Carolina appeared in the Federal courts through its own counsel, it being a party to the proceedings, and the fact that North Carolina paid the costs assessed against it does not give rise or support to the claims of the Petitioners.

CONCLUSION

If there is still any separation of powers between the State and Federal Government, then the Petitioners' claims cannot be sustained. The fact that the State prosecuted the Defendant, Elmer Davis, Jr., does not support the claims of the Petitioners, Nivens and Bell. The State did not institute any proceedings in the Federal Court and cannot by any

stretch of the imagination incur obligations to the Petitioners because it defended itself in the Federal courts. For these reasons the Petition for Certiorari filed in this matter should be denied.

Respectfully submitted,

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